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OWNERSHIP OF SPACE

*By Thompson George Marsh**

IT would be giving away the whole story to state at the outset that this discussion is to be about nothing, or nothingness, and so the more scientific term, "space" has been adopted. The mere fact that space may not have any value does not negative the possibility of ownership thereof, because the law is well settled that there may be ownership of almost any sort of a new idea, and ownership of shares in almost any sort of a corporation, new or old.

Almost any tangible object can be owned if it can be possessed or occupied, and the same is true of three dimensional space defined by reference to the earth.

Ordinarily land is not considered as having three dimensions, but it must necessarily be so, and if the old maxim, "cujus est solum ejus est usque ad coelum et at inferos", be true, the normal shape of land must be that of an inverted pyramid, with its apex at the center of the earth, its sides determined by planes passing through the surface boundaries, and its base "ad coelum". By a doctrine of accession any tangible objects which are affixed within this space are considered to be a part of the land. But when tangible things are detached or removed from the space they are no longer land but chattels, as rock that has been quarried, and they remain chattels until again affixed within some space, as rock in a foundation.

This at least establishes that the objects themselves are not land, and the other side of the proposition, namely, that mere space is land, is just as true.

It is said that the largest building in the world is the Merchandise Mart in Chicago; not the tallest, but the largest in cubic feet. The building is not owned by the owner of

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the soil beneath it, nor was the right to possession acquired by a lease. The soil was owned in fee simple by the Chicago and Northwestern Railway Company and that part of the space to be occupied by the building was conveyed in fee simple to the owners of the building. The rest of the land, including the surface and some space above it, was reserved by the Railroad. The building is supported by piers and I am not informed as to the ownership of the land upon which those piers rest.

This is certainly an extreme illustration of the proposition that mere space is land and as much may be owned, whether it be above or below the surface of the ground. And it is believed that the incidents of ownership of space or land are very much the same whether the land be above or below the surface of the ground.

Chief among the incidents of ownership of ordinary land space are four claims: that the support of the soil, in its natural state, be not removed by another so as to cause substantial damage; that the land be not occupied or possessed by another; that a reasonable use of the land be not interfered with unreasonably by another; and that the close be not broken by another.

As to the validity of these claims as incidents of the ownership of space above the surface, the maxim quoted above is not a sufficient basis upon which to base any conclusions.

At a meeting of the Air Law Institute in the summer of 1930, Dr. Arnold D. McNair, Lecturer in Law at the University of Cambridge, referred to the ancient maxim, not as a maxim, but as a "slogan", and that seems a proper evaluation. It is found in the Year Books, but it would not have gained much of a place in the common law, had it not been used by Coke in his Commentary upon Littleton. The context in which it is there found may perhaps account for its remarkable virility. In his discussion of fees simple the author says of land, "and therefore this element of the earth is preferred before the other elements; first and principally, because it is for the habitation and resting place of man; for man can not rest in any of the other elements, neither in the water, ayre, or fire. For as the heavens are the habitation of Almightie God, so the earth hath he appointed as the suburbs

of heaven to be the habitation of man; * * * Besides, everything, as it serveth more immediately * * *for the food and use of man* * * * hath the precedent dignity before any other. And this doth the earth; for out of the earth commeth man's food, and bread that strengthens man's heart, and the wine that gladdeth the heart of man, and oyle that makes him a cheerful countenance * * * Also the waters that yeeld fish for the food and sustenance of man are not by that name demandable in a praecipe; but the land whereupon the water floweth or standeth is demandable: and besides, the earth doth furnish man with many other necessaries for his use, as it is replenished with hidden treasures; namely, with gold, silver, brasse, iron, tynne, lead, and other metals, and also with a great varietie of precious stones, and many other things for profit, ornament and pleasure. And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven; for cujus est solum ejus est usque ad coelum".

In spite of its antiquity, that is not a very impressive statement of a rule of law, though it did set the slogan off to a good start and it has been quoted ever since.

Getting back to a consideration of the claims incident to ownership of land and a consideration of their meaning when the land is space above the surface, we can at once recognize the irrelevance of a claim that the support of the land in its natural state be not removed by another, and pass to a consideration of the second claim, that the space be not occupied or possessed by another. In positive terms this means that the owner of the ground has the exclusive rightful power to occupy the space above the ground. Of this there is no doubt, for there are many cases ordering or justifying the removal of overhanging eaves and signs and lights and branches. In Butler v. Frontier Telephone Co., 186 N. Y. 486; an action of ejectment was maintained against a defendant who had stretched a wire high above the surface of the plaintiff's land, and in the case of the Merchandise Mart already mentioned, since the grantees have acquired by conveyance the exclusive rightful power to occupy the space above the surface, that power must have been an incident of the ownership of the land even before the space above the surface was actually oc-

cupied. In this respect there seems to be no difference between the claims of the owner with reference to ground space and air space.

The third incident of land ownership to be considered is the claim that a reasonable use of the land be not interfered with unreasonably by another. These are the cases of nuisances, by noises, odors, destructive fumes, vibrations, smoke, dust, fear and other means of interference with enjoyment of land, not involving a technical breaking of the close. In order to be actionable such interference must not only result in substantial damage to the landowner, but it must be the result of a negative or positive act of the defendant which under all the circumstances is unreasonable. This is true whether the means of interference be transmitted through the air or through the ground. And since the damage to the landowner is determined by reference to use, rather than to space, it seems that in this respect the claim of the landowner is not affected by the fact that the space involved may be above or below the surface of the ground.

It is the fourth claim, that the close be not broken by another, which raises the most interesting questions. It is undoubtedly the general rule that any violation of this claim makes the wrongdoer liable in trespass, whether he has acted in good faith or bad faith, and whether damage has been caused or not.

But while this is the general rule there are some interesting exceptions, some of the best examples of which are furnished by the decisions from our own state.

In Yunker v. Nichols, 1 Colo. 551, it is said that one who breaks the close for the purpose of diverting and appropriating water is not liable for so doing.

And in Morris v. Fraker, 5 Colo. 425, it was held that if cattle enter upon the land of the plaintiff and destroy crops, the owner of the cattle is not liable unless the land was protected by a fence sufficient to turn ordinary stock.

In these cases the judges expressly stated that the results were not based upon any statute, but simply upon what they called necessity. The necessity lay merely in the fact that if such invasions of the close were held actionable it was believed that the development of agriculture and grazing would be

seriously hampered, and the importance of those industries was held to justify the departures from the general rule of the common law, even though in both cases there was not merely a technical breaking of the close but resulting damage of considerable consequence.

What about a breaking of the close above the surface of the ground? Lord Ellenborough, in 1815, raised this quaere in Pickering v. Rudd, a case in which it was decided that the defendant's sign board did not hang over the plaintiff's land. Such a case as a matter of course involved a discussion of the maxim about heaven, and in the course of his opinion, Lord Ellenborough said something about a balloon. As reported in 4 Campbell 219, he said, "Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass quare clausum fregit, at the suit of the occupier of every field over which his balloon passes in the course of his voyage."

But as reported in 1 Starkie 45, he simply asked, "would trespass lie for passing through the air in a balloon over the land of another?"

In my opinion that question has not yet been answered, though it was presented for decision in two cases which have been reported during the past few months. Smith v. New England Aircraft Co., 170 N. E. 385; and Swetland v. Curtiss Airports, 41 Fed. 2nd. 929. In both cases the complainants owned country estates adjoining airports and in both cases bills were brought to enjoin flights by planes over the land of the complainants, or perhaps more accurately, *into* the land of the complainants. Both decisions relied to a considerable degree upon the United States Air Commerce Act of 1926 wherein penalties are provided for flights under minimum altitudes of safety. The act empowered the Secretary of Commerce to determine the minimum altitudes of safety. His regulation, contained in the Air Commerce Regulations of 1928, is as follows: "exclusive of taking off from or landing on an established landing field, airport, or on property designated for that purpose by the owner, * * * aircraft shall not be flown (1) over the conjested parts of cities, towns, or settlements except at a height sufficient to permit of a reasonably safe emergency landing, which in no case shall be less than 1,000

feet. (2) Elsewhere at heights less than 500 feet, except where indispensible to an industrial flying operation."

In both cases the lands involved were in uncongested areas, and in both it was held therefore that flights at an altitude of over 500 feet were not actionable. Presumably then, the "coelum" begins at 500 feet and according to Lord Coke's explanation of the maxim, the Secretary of Commerce has the power, within the limits of a sound discretion to enlarge or even to diminish the area of the "habitation of Almightie God" at will, with the corresponding loss or gain to all the owners of parts of the "habitation of man" in the United States.

And the Secretary of Commerce has done just that, by an amendment to the Federal Air Traffic Rules, effective September 19, 1930, subsequent to the decisions in these cases. The amendment says that, "The minimum safe altitudes of flight in taking off and landing and while flying over the property of another in taking off or landing, are those at which such flights by aircraft may be made without being in dangerous proximity to persons or property on the land or water beneath, or unsafe to the aircraft."

To be consistent, it would seem that these courts would have to give full effect to the amended regulation, and hold all such flights not actionable. But to give such effect to a traffic regulation seems to be either silly, or unconstitutional, as a taking of property without compensation, for while regulation of flight is undoubtedly within the broad scope of the police power, the taking of land for highways has not heretofore been thought to be.

As to flights under 500 feet, both courts ignored that part of the same sentence of the Regulation which excepted such flight when landing or taking off.

It is hard to understand why equal force should not have been given to both parts of the same sentence of the law, but it was not, and the courts proceeded to consider the lower flights on common law principles. In the Smith Case, the court considered these lower flights in two groups.

As to flights between 100 and 500 feet, the court said, "The one or two instances of flights at less than 500 feet over land of the plaintiffs and the possibility of similar flights in

the future, as set out by the master and already narrated, are not sufficient to require or warrant injunctive relief. The injury thus done to and the interference with any and all valuable *use* of the property of the plaintiffs are not certain and substantial, but rather are slight and theoretical. There has been no physical contact with property of the plaintiffs in actual *use* or practicably usable."

This is certainly not a holding that such flights are trespasses.

As to flights under 100 feet, the court said, "In degree these flights approach much more closely to an *interference with rightful enjoyment* of land than do flights at the minimum altitude permissible for general travel by aircraft. * * * The facts show an intrusion upon the land of the plaintiffs by flight of aircraft at these low altitudes, by noise, and by the presence of the aircraft and its occupants. These interferences create in the ordinary mind a sense of infringement of property rights which can not be minimized or effaced. * * * The combination of all these factors seems to us, under settled principles of law, * * * to constitute *trespass* to the land of the plaintiffs so far as concerns the take-offs and landings at low altitudes and flights made over the land of the plaintiffs' at altitudes as low as 100 feet."

But the injunction was denied and the bill dismissed because the plaintiff had not shown any damage to his property or its use. Nor were even nominal damages allowed. The court says, "Whether the case should have been retained for assessment of damages, rested in the sound judicial discretion of the trial judge. That was exercised against the plaintiffs and presents no error of law. At most upon this record, there could have been nothing more than nominal damages".

The decree was entered dismissing the bill with costs to be taxed in favor of the defendants against the plaintiffs.

Those who contend that the mere flight into space above the surface is a trespass will gain pleasure from the language of this opinion, but the plaintiff who rested his suit upon that claim did not gain so much pleasure. He got no injunction and no damages and had to pay the costs.

The decision in its actual holding, does not go very far toward protecting the claim of the landowner, that the close

be not broken, even at altitudes of less than 100 feet, because the elements upon which the court relied "to constitute trespass" would, according to general rules, constitute nuisance, the only new principle being the inclusion of the mere "presence of the aircraft and its occupants" as a significant element of interference with a use of the land which requires privacy for its enjoyment.

In the Swetland case all flights under 500 feet were enjoined. The language of the court is as follows: "Whether property rights or effective possession is interfered with *unreasonably* is a question of fact in the particular case. * * * In this instance, in view of the *magnitude* of the defendants' contemplated operations, in the opinion of the court, the probability is that if defendants were permitted in taking off and landing to fly at altitudes lower than 500 feet, such flying, *if it would not constitute a trespass, would at least constitute the maintenance of a nuisance.*"

This certainly is not a holding that mere flight above the surface of the ground, even at a height of less than 500 feet is a trespass. Rather, the relief was granted to prevent a violation of the third claim of the landowner, that there be no reasonable interference with a reasonable use of the land.

The landowner has the exclusive right to occupy the space and need not show actual damage in order to maintain an action based on an unauthorized occupation of any part of the space.

These two cases then, leave the law concerning ownership of space above and below the surface of the ground, just about where it was.

The landowner can protect his right to enjoy the use of his land by action for damages or injunction, if he suffers substantial injury and the injury results from an unreasonable act by the defendant such as a low and noisy and dangerous flight through the air space.

But the landowner has not yet been allowed to maintain an action of any sort against the defendant who merely flys through the plaintiff's space, coming in contact with no tangible thing, possessing no part of the space, and causing no substantial injury to the landowner in the enjoyment of his land. And as yet it has not been necessary to resort by way of

what seems a valid analogy, to the exception based on necessity, as in the early development of agriculture and grazing in this state.

Nothing has been said about the Uniform State Law for Aeronautics because it did not apply to the cases discussed and because it would seem that such legislation could not constitutionally diminish whatever common law property rights already existed. However, the act has been adopted in more than twenty states, and its provisions should be noted.

SECTION 3. "The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in section 4."

"SECTION 4. "Flight in aircraft over the land and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable".

In effect, this seems to be a statute declaratory of the common law principles of the ownership of space.